# In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
GEORGE E. CADARE, EDWARD PARKER, JOHN J. KEATING, and JOHN N. MYERS, respondents. } No. 436.

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.*

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## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case involves the construction and application of the following section of the District code (31 Stat., 1189, 1342):

> SEC. 939. ABANDONMENT OF PROSECUTION. If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned, and

> the accused shall be set free or his bail discharged, as the case may be: *Provided, however,* That the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury.

The code was established by act of Congress approved March 3, 1901, which expressly provided (sec. 1) that it should "go into effect and operation from and after the first day of January, in the year of our Lord nineteen hundred and two."

The following "repeal provisions" of the code bear upon the construction of section 939 (31 Stat., 1435–1436):

> SEC. 1638. The repeal by the preceding section of any statute, in whole or in part, shall not affect any act done or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before such repeal, but all rights and liabilities under the statutes, or parts thereof so repealed shall continue and may be enforced in the same manner as if such repeal had not been made: *Provided,* That the provisions of this code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings, civil or criminal.
>
> SEC. 1641. All offenses committed and all penalties or forfeitures incurred in the District prior to the date on which this code is to take effect

> may be prosecuted and punished in the same manner and with the same effect as if this code had not been enacted.

Respondents were arrested April 25, 1901, upon a warrant charging them with conspiracy to defraud, laid on April 22. (R., 1.)

They were arraigned in the police court on the same day, pleaded not guilty, and were held to await action by the grand jury. (R., 2.)

Parker and Keating were admitted to bail April 27 (R., 2–6), Cadarr and Myers May 7, 1901. (R., 7.)

On March 31, 1902—eleven months after the arrest and three after the code became operative—the grand jury returned an indictment for conspiracy. (R., 8.)

April 4, 1902, Cadarr, Keating, and Myers were arraigned in the Supreme Court of the District and pleaded not guilty. April 7 Parker was arraigned and entered the same plea. (R., 11.)

May 1, 1902, Parker withdrew his plea and filed a motion to quash—

> Because the said indictment was not returned into court within nine months after the 25th day of April, A. D. 1901, on which said day this defendant was held to bail to await the action of the grand jury on said charge of conspiracy; the time for taking action in said case not having been enlarged by this court, or any justice thereof (as appears from the record herein), as provided by section 939 of the act to establish a code of law for the District of Columbia, approved March 3, 1901.

The court sustained the motion, directed that Parker's bail be discharged, and that from the indictment all the defendants go without day. (R., 13.) The Court of Appeals sustained this order.

The case is here upon writ of certiorari granted December 5, 1904.

## ASSIGNMENT OF ERRORS.

1. If a release or discharge under section 939 operates as an acquittal and bars further prosecution, the Court of Appeals erred in holding that section applied to arrests made before the code took effect.

2. The Court of Appeals erred in holding that the period of nine months in which the grand jury is required to act began to run from the time of arrest and not from the time when the code took effect.

3. The Court of Appeals erred in holding that failure of the grand jury to act within the prescribed time operates as an acquittal and bars further prosecution.

## ARGUMENT.

### I.

### Application of the statute to arrests made before the code took effect.

Section 1638 of the code provides:

> That the provisions of this code relating to *procedure* or practice *and not affecting the substantial rights of parties* shall apply to pending suits or proceedings, civil or *criminal*.

Section 939 is a provision relating to procedure, and appears in chapter 20, entitled "Criminal Procedure" (31 Stat., 1337).

If section 939 be construed and applied as it was by the courts below, it is clearly a provision as to procedure "affecting the substantial rights of parties," within the meaning of section 1638, and therefore does not apply to arrests made prior to January 1, 1902. Those courts have decided that in less than one month after that date—nine months from the arrest terminated January 24, 1902—appellees were entitled to have their bail discharged and the prosecution against them was absolutely barred.

To hold that section 939, so construed, applied to arrests made before the code took effect would nullify section 1641, which provides:

> All offenses committed and all penalties or forfeitures incurred prior to the date on which this code is to take effect may be prosecuted and punished in the same manner and with the same effect as if this code had not been enacted.

## II.

### When statutory period began to run upon arrests made before the code took effect.

If section 939 applies to arrests made before the code became effective, the nine months' period in which the grand jury is required to act began to run from the date it took effect.

The courts below have given the statute a retrospective effect. The arrests were made eight months be-

fore the code became operative, and it has been held that one month thereafter respondents were entitled to have their bail discharged and the prosecution against them was barred. By the same logic, if the arrests had been made more than nine months, the Government would have had no opportunity whatever to prosecute respondents after the code became effective. In other words, section 939 would have operated as a statute of amnesty and oblivion.

The statute, in any view, should, under well-settled principles, be given a prospective and not a retrospective effect.

The rule is thus stated by Mr. Justice Harlan in *Chew Heong* v. *United States* (112 U. S., 536, 559):

> In *United States* v. *Heth* (3 Cranch, 398, 413) this court said that "words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied;" and such is the settled doctrine of this court. (*Murray* v. *Gibson*, 15 How., 421, 423; *McEwen* v. *Den.*, 24 How., 242, 244; *Harvey* v. *Tyler*, 2 Wall., 328, 347; *Sohn* v. *Waterson*, 17 Wall., 596, 599; *Twenty Per Cent Cases*, 20 Wall., 179, 187.)

The act establishing the code, so far from requiring that any of its sections should have a retrospective effect, expressly provides that it is "to go into effect and operation *from and after* the first day of January, in the year of our Lord nineteen hundred and two."

Section 1641 provides that all offenses committed prior to the taking effect of the code may be prosecuted and punished in the same manner and with the same effect as if it had not been enacted.

The applicable rule is stated in *Sohn* v. *Waterson* (17 Wall., 596), where it was held that, as applied to causes of action theretofore accrued, a statute of limitations begins to run, in the absence of contrary provision, from the date of its passage.

Statutes reducing the period of limitation are constitutional when they allow reasonable time in which to bring suit.

*Terry* v. *Anderson*, 95 U. S., 633.
*Koshkoning* v. *Burton*, 104 U. S., 675.
*McGahey* v. *Virginia*, 135 U. S., 705.

But when a statute changes or shortens the period of limitation, one whose cause of action accrued prior to its passage has the full time given by it in which to sue. In other words, the period of limitation begins to run from the date of the new act and not from the time when the cause of action first accrued.

*Sohn* v. *Waterson*, 17 Wall., 596.
*Rodebaugh* v. *Phila. Traction Co.*, 190 Pa. St., 358.
*Bowden* v. *Railroad Co.*, 196 Pa. St., 562.
*Warshung* v. *Hunt*, 18 Vroom (N. J.), 256.
*Huber* v. *Zimmerman*, 8 Okla., 573, and other Oklahoma cases cited, all based on *Sohn* v. *Waterson*, *supra*.
*Tacoma Bldg. Assn.* v. *Clark*, 8 Wash., 289.
*State* v. *Jones*, 21 Md., 432.

*Stephen* v. *Lewis*, 62 Md., 229.
*Garrison* v. *Hill*, 81 Md., 551.
*Manning* v. *Carruthers*, 83 Md., 1.

Section 939 introduced a new provision into the criminal law of the District, and as the act establishing the code provides that it is to operate prospectively, no exception in respect of that section seems permissible.

The fact that the act was approved several months prior to the date when the code took effect did not cause section 939 or other sections to operate retrospectively. Ordinarily, a statute speaks from the time it goes into effect, not from its passage. Congress took especial care to provide that the code should not operate retrospectively, but should go into operation "from and after" January 1, 1902. Section 1638 emphasizes this, for it provides that suits and proceedings pending when the code took effect should not be affected, *even at that date*, by provisions relating to procedure and practice which affected substantial rights. So, too, section 1641 was intended to prevent the establishment of the code from interfering with the prosecution and punishment of offenses theretofore committed.

The purpose of Congress in making the code effective at a future date was to give ample notice of changes. Such notice was not complete until the lapse of the entire period contemplated.

This accords with the views expressed by Judge Cooley, in *Price* v. *Hopkin* (13 Mich., 318), wherein the court held:

> A statute passed to take effect at a future day is to be understood as speaking from the time it goes into operation, and not from the time of its passage. The intervening period is allowed to enable the public to become acquainted with its provisions; but until it becomes operative as a law, they are not compelled to govern their actions by it.

Judge Cooley's views were adopted by the court of appeals of New York in *Gilbert* v. *Ackerman* (159 N. Y., 118, 123) construing a statute of limitations passed several months before it took effect.

## III.

**Failure of grand jury to act within prescribed time does not operate as an acquittal and bar further prosecution.**

The object of section 939 was to limit the time one charged with crime might be *committed or held to bail pending action by the grand jury.* It does not say if the grand jury fail to act within the prescribed time the accused shall be discharged of the *offense*, but that he "shall be *set free* or *his bail discharged.*"

The Court of Appeals argue that unless the section be construed to give the accused final discharge from the offense it is without effect. They say:

> According to the common law, cases ignored and cases indicted are both subject to new inquisition and further indictment by grand jury, and such is the situation in which are left the cases exempted from the operation of the statute at bar.

> Now it occurs to us that if the second meaning be assigned the statute—we mean that construction which permits future indictment after nine months of the cases operated upon by the statute, as well as those not operated upon—we shall behold upon the part of Congress a painstaking discrimination of all criminal charges into two classes, one wherein action is had within nine months; the other, no action within nine months; one class exempted from the operation of the statute and left so that indictment may be had after nine months, according to the common law; the other class within the operation of the statute, and yet with but the same result that in this class, too, indictment may be had after nine months; a division into classes for the purpose of legislation; an exemption of one class from the legislation; legislation for the other class, and yet the law turns out the same for both. The law for the class legislated upon remains the same as the law for the class not legislated upon, legislation had, but the law upon the point of the legislation remains the same as it was before legislation, but no change in the law.

The fallacy of this argument lies in the assumption that Congress intended to limit the time in which an indictment might be found, whereas the intention was to limit the time that the accused might be *committed or held to bail pending action by the grand jury.* The statute provides he shall not be so committed or held longer than nine months. This was a vital change in the existing law.

In support of the position that the discharge was from the offense and final, the Court of Appeals further said:

> It is provided in the section that the criminal term of the Supreme Court of the District, or in vacation any of its justices, "upon good cause shown in writing, may from time to time enlarge the time for taking action in such case by the grand jury."
>
> If the second meaning be attached to the statute, to wit, that the discharge is only from the pending prosecution, this proviso turns out not only unnecessary, but idle and useless; for if the discharge is only from the pending accusation, this leaves the grand jury already free to indict at a later period, because, according to the construction, it has never been deprived of that power. There is neither need nor reason for vesting in the court power to extend the time for action if action may be had independent of any extension; the fact that power to extend the time for action is conferred, and is to be granted only "upon good cause shown in writing," shows the legislative mind to have understood that unless there was extension, the time for action has finally expired with the nine months.

Here again is the erroneous assumption that Congress intended to limit the time in which an indictment may be found. The purpose of the proviso is to afford the Government opportunity to enlarge the time during which the accused may be *committed or held to bail pending action by the grand jury*, not the time in which it might procure an indictment If the

grand jury fail to take action within nine months, then the accused is to be set free or his bail discharged—and that is as far as the statute pretends to go. It is silent as to the finding of an indictment after such release or discharge.

The period in which an indictment may be found is fixed by section 1044, Revised Statutes of the United States, in force in the District by section 1 of the code. Under that section an indictment for conspiracy must be found within three years. As construed by the Court of Appeals, section 939 of the code operates to amend or repeal section 1044 in cases where arrests are made, although there is no intimation of such intention. It is well settled that repeals by implication are not favored.

The Court of Appeals further suggests that if the discharge of the accused under section 939 be not from the offense and final, nothing will be accomplished thereby, as he may be immediately rearrested. This by no means follows, and if it did, would not be conclusive. It may be said, however, that since the statute contemplates that a person shall not be committed or held to bail pending action by the grand jury for a longer period than nine months, unless the time shall be enlarged as stated, if discharged under that section he could not be rearrested, unless the grand jury had in the meantime taken action by finding an indictment against him, or for other sufficient reasons.

The construction adopted by the Court of Appeals leaves one whose case has been acted upon by the grand jury, and the charges against him ignored, in a worse attitude than one whose case has not been investigated at all. The latter, after nine months, is to go scot free, while the former, although the charges against him have been found to be unwarranted, is still subject to indictment at any future time within the general period of limitation. Congress surely could not have intended this.

The meaning of section 939 is elucidated by another in the same chapter (31 Stat., 1339):

> SEC. 921. DISCHARGING DEFENDANTS DURING TRIAL. When two or more persons are jointly indicted the court may, before a defendant has gone into his defense, direct any such defendant to be discharged that he may be a witness for the United States. An accused party may also, when there is not sufficient evidence to put him upon his defense, be discharged by the court, or, if not discharged by the court, shall be entitled to the immediate verdict of the jury for the purpose of giving evidence for the other parties accused with him; and such order of discharge in either case, equally with the verdict of acquittal, *shall be a bar to another prosecution for the same offense.*

The care with which this section provides that a discharge shall operate as an acquittal and bar prosecution negatives the idea that the same effect was intended to follow from the provision in section 939 that an arrested party, for failure of the grand jury to act,

"shall be set free or his bail discharged." Such a purpose should not be lightly assumed. It means absolute immunity to violators of the law, within a brief period, without satisfactory reason therefor. A defendant discharged under section 921, secures immunity in the one case by becoming a witness for the Government, in the other, because there was no sufficient evidence to warrant the charge. But upon what ground can it be said that one within the provisions of section 939 is entitled to immunity? The law provides that one charged with crime shall not be unduly inconvenienced, and therefore if his case be not seasonably acted upon by the grand jury, he shall be set free or his bail discharged. But such inconvenience should not be taken as a satisfaction of all punishment. Suppose the party arrested had committed willful murder, for which there is no limitation (see sec. 1043 R. S.), under the view taken below failure of the grand jury to act within nine months might operate as an acquittal and put the murderer at large.

*The Authorities—Further Prosecution.*

The Court of Appeals cites no authority in support of its view that the discharge under section 939 is from the offense and final. Similar statutes exist in many of the States. Some of them state in express terms that in case of a failure to find or prosecute an indictment within a specified time the accused shall be discharged of the offense. Thus the Georgia statute provides that he "shall be absolutely discharged

and acquitted of the offense charged in the indictment;" the statutes of other States that "he shall be discharged so far as relates to the offense for which he was committed." Such expressions have been held to amount to an acquittal and bar further prosecution.

*Jackson* v. *State*, 76 Ga., 551, 565.
*Steward* v. *State*, 13 Ark., 720, 730.
*Johnson* v. *State*, 42 Ohio St., 209.
*State* v. *Wear*, 145 Mo., 162.

But, except for a mere dictum in *McGuire* v. *Wallace* (109 Ind., 284, 289), the decisions are uniform that a simple direction that the prisoner "shall be discharged" for failure to bring him to trial within the time specified does not operate as an acquittal and bar further prosecution.

In *McGuire* v. *Wallace* the Supreme Court of Indiana held that it had no authority, upon *habeas corpus*, to review the judgment of the trial court refusing to discharge the petitioner for want of prosecution, incidentally observing that a discharge under the statute of that State amounted to an acquittal of the offense, basing this statement upon the Ohio decisions without noting the difference in the language of the Ohio statute.

In *State* v. *Wear* (*supra*) the Supreme Court of Missouri refers to the difference between the New Jersey statute, which provides that the defendant "shall be discharged," and the Missouri statue, which provides that he shall be "entitled to be discharged *so far as relates to such offense*," and observes that the former "intends

only a simple discharge without any finality to it." (145 Mo., 190.)

In *In re Edwards* (35 Kan., 99, 103), the Supreme Court of Kansas distinguished its statute, which provides that the "accused shall be discharged so far as relates to such offense," for delay in bringing to trial after indictment found or information filed, from the Illinois and Colorado statutes:

> The statutes construed in the cases of *Brooks* v. *People* (88 Ill., 327) and *In re Garvey* (4 Pac. Rep., 758; 7 Colo., 502) do not provide for any discharge of the offense, but operate merely to set the prisoner at liberty. In this State the statute provides for the absolute discharge of the prisoner from the offense, and therefore Illinois and Colorado decisions are not applicable.

But in that case the court also said that, since a discharge under the Kansas statute would operate as an acquittal, "there is good reason for holding that the prisoner ought not to be entitled to his discharge unless he brings himself without the spirit of the statute;" that "the statute was designed to shield the innocent from oppression, but not to enable the guilty to escape"—citing *Steward* v. *State* (13 Ark., 720), and *Clark* v. *Comth.* (29 Pa. St., 129). Accordingly, although the statutory period had elapsed, the court directed that the petitioner be remanded to custody, because "he has not seemed anxious for any hearing of the case against him upon its merits, but has only desired a discharge, without any trial."

In the present case respondents remained silent until they were brought to trial, and then demanded their release.

Section 7, *habeas corpus* act, 31 Charles II, chap. 2, provides that if any person committed for treason or felony, upon his prayer or petition in open court to be brought to trial, shall not be indicted the next term, the courts are authorized and required, upon motion by the prisoner or some one in his behalf, "to set at liberty the prisoner upon bail," and if not indicted and tried the second term after his commitment, or upon his trial acquitted, "he shall be discharged from his imprisonment."

The English decisions do not indicate the effect, under this act, of a discharge for failure to prosecute.

In *King* v. *Platt* (1 Leach's Crown Law, 157), justices of gaol delivery held that they had no authority, under the act, to admit to bail one committed for high treason or to discharge him for want of prosecution. But they said (p. 170):

> The prisoner may apply, under the *habeas corpus* act, to the court of King's Bench, to be tried or bailed; and if not tried in two terms after his prayer is received, he will be entitled to his discharge.

The requirement that after the lapse of two terms without trial the prisoner shall be discharged from imprisonment would seem to be imperative. But in *Rex* v. *Walter* (8 Mod., 5), the court, while stating that, under the statute, a prisoner ought to have been

tried within two terms after he was indicted, "was of opinion to bail him; but he having no bail was remanded." See also *Regina* v. *Bowen*, 9 C. & P., 509.

The statute of 31 Charles II was formally reenacted in some of the American colonies; in others it was merely recognized as being in force. (Church on Habeas Corpus, c. 1, sec. 38 et seq.; Hurd on Habeas Corpus, c. 5.)

In Maryland, Hurd states (p. 113), "there was no provincial act upon the subject, and yet it was recognized and practically adopted." It would seem to follow that the statute was and is in force in the District of Columbia, unless inconsistent or replaced by some provision of the Code. (See sec. 1 of the Code, 31 Stat., 1189.)

The English statute was reenacted in South Carolina at an early date, and has been construed by its courts. In *State* v. *Fley*, 2 Brevard, 338, 348, the court said:

> The discharge of Rochelle under the *habeas corpus* act can not, upon any sound principle, be considered as an acquittal from the charge, so as to bar a subsequent prosecution for the same offense. The act was made to secure the citizens of the State from vexatious arrests and imprisonment, and not to protect them from prosecutions for crimes actually committed. The act in favor of liberty was sufficient to operate the discharge of the prisoner, Rochelle, from his former imprisonment, when the State's officer was not ready to produce the proofs of his guilt; but it would be monstrous to say that such discharge should shield him from a sub-

> sequent prosecution, when the proofs of his guilt are ready to be produced.

Approved in *State* v. *Williams*, 35 S. C., 163.

The statute of 31 Charles II was also reenacted in New Jersey, and in *State* v. *Garthwaite*, 23 N. J. L., 143, 147, the phrase "discharged from his imprisonment" was construed by the highest court of that State:

> The discharge, in its very terms, is to be from imprisonment. And of necessity it can not be from the indictment nor from its penalty, because, in contemplation of the law, the discharge may be by virtue of a writ of *habeas corpus* by authority of a tribunal having no cognizance of the indictment or of the crime.

The present New Jersey statute provides, where trial is delayed, that "the defendant shall be discharged." This is held to grant mere release from imprisonment, and not immunity from further proceedings.

*State* v. *Garthwaite*, supra.
*Apgar* v. *Woolston*, 43 N. J. L., 67.

The difference between a provision for discharge from imprisonment and one for discharge from crime is well illustrated in the Virginia statutes and decisions. Section 28, code of 1819, c. 169, provided:

> Every person charged with such crimes (treason or felony), who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appears to have been prevented by himself, shall be discharged from his

> imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime; unless, etc.

The distinction between failure to indict and failure to try is carried through subsequent statutes down to the present, with slight changes in phraseology. (See the successive statutes set out in note to Adcock's case, 8 Gratt., 662; and the two provisions are separated in the code of 1873, c. 201, sec. 13, c. 202, sec. 34.)

Under that legislation, where one is not brought to trial in due time, he "shall be forever discharged of the crime;" and this imports immunity from future prosecution. (*Green* v. *Com'th*, 1 Rob., 731.) But where the delay is in finding an indictment, the accused is "discharged from his imprisonment," and remains liable to subsequent arrest and indictment. (*Waller* v. *Com'th*, 84 Va., 492, 494.)

To the same effect are the decisions in California and Mississippi.

> *In re Begerow*, 133 Cal., 349; 136 Id., 293.
> *Byrd* v. *State*, 1 How. (Miss.), 163, 171.

The language of the District code is not that the accused "shall be discharged," but that he "shall be *set at liberty* or *his bail discharged*," as the case may be. The implication that this language was intended to operate as an acquittal is less strong than where a statute provides that the accused "shall be discharged."

The Colorado statute provides that the accused

"shall be set at liberty." This has been held to entitle the prisoner to freedom, but not to relieve him from prosecution. The distinction between such language and that used in statutes, a discharge under which has been held to operate as an acquittal, was clearly pointed out in *In re Garvey* (7 Colo., 502, 509).

All doubt would seem to be removed by the alternative in section 939, "or his bail discharged." Mere release of an accused from bail was surely never intended to operate as an acquittal and a bar to further prosecution.

*Subsequent Arrest.*

Perhaps one set free or whose bail has been discharged under section 939 may not be rearrested for the same offense until indicted, unless other reasons imperatively require it. But, if it were otherwise, that would not justify a different construction from the one asked by the Government. It has never been held that the discharge of a person from one confinement, which was originally or had become illegal, precludes a second or a third arrest for the same cause.

One released from imprisonment upon *habeas corpus* may be immediately rearrested for the same offense upon new process issued by a court of competent jurisdiction. Section 6 of the *habeas corpus* act of 31 Charles II provides:

> That no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offense by

> any person or persons whatsoever, *other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.*

The *habeas corpus* act was intended to prevent arbitrary arrest and commitment by the Crown; not to interfere with, but to facilitate, the trial of affenders.

In *Ex parte Milburn* (9 Pet., 709) Mr. Justice Story, speaking for the court, said:

> A discharge of a party, under a writ of *habeas corpus*, from the process under which he is imprisoned, discharges him from any further confinement under the process; but not under any other process which may be issued against him under the same indictment.

One held under illegal sentence is entitled to release on *habeas corpus*, but he may be at once retaken and held for new sentence.

*In re Bonner*, 151 U. S., 242.

Nor does a discharge on *habeas corpus* preclude an investigation by the grand jury; release from imprisonment does not wipe out the offense.

2 Spelling, Extraordinary Relief, sec. 1227.

*Abandonment of Prosecution.*

The fact that section 939 provides that "the prosecution of the charge shall be *deemed* to have been abandoned," furnishes no argument in support of the contention that a discharge bars further prosecution.

An *actual* abandonment does not have that effect. Even a formal *nolle prosequi* leaves the accused liable to new indictment and to all the consequences of his offense as if there had been no abortive prosecution.

1 Chitty Crim. Law, 480.
1 Bishop Crim. Proc. (3d ed.), sec. 1395.
*Goddard* v. *Smith*, 6 Modern, *262.
*Dealy* v. *United States*, 152 U. S., 542.

The statute merely makes the presumptive abandonment of the charge upon which the party was arrested ground for his being set free or having his bail discharged. The charge having been abandoned—actually or presumptively—there is no longer any justification for commitment or bail. But if a crime has been committed, and can at any later time within the period of limitation be proved, the public interest requires that the Government have an opportunity to do so, whether the charge had theretofore been actually or presumptively abandoned.

*Abandonment can not be pleaded after indictment.*

After indictment it is too late for the accused to plead abandonment of the prosecution. The purpose of the statute being simply to prevent one from being committed or held to bail pending action by the grand jury for an undue length of time, and not to defeat indictment, but rather to promote it, he must take advantage of the statute while the delay exists.

It is well settled that statutes providing for the discharge of a prisoner for failure to prosecute do not

operate of themselves, but require that he demand and receive an order of court to make them effective.

*Stewart* v. *State*, 13 Ark., 720.
*Dillard* v. *State*, 65 Ark., 404.
*People* v. *Hawkins*, 127 Cal., 372.
*McGuire* v. *Wallace*, 109 Ind., 284.
*State* v. *Cox*, 65 Mo., 29.
*Ex parte Walton*, 2 Wharton (Pa.), 501.
*Bennett* v. *State*, 27 Tex., 701.
*Hernandez* v. *State*, 4 Tex. App., 425.

The *habeas corpus* act of 31 Charles II requires prayer or petition in open court.

They are not statutes of limitation; failure to comply with them is a mere irregularity.

*People* v. *Rulloff*, 5 Parker's Crim. Rep. (N. Y.), 77.

Discharge is a matter of discretion.

*Patterson* v. *State*, 49 N. J. L., 326.
*State* v. *Nugent*, 71 Mo., 136.
*In re Edwards*, 35 Kan., 99.

Under section 939, one committed or held to bail must apply to a court of justice of competent jurisdiction—and the better rule would be that he must apply to the court having jurisdiction of the offense—for an order directing his discharge or releasing his bail. The warden of the jail can not determine whether the conditions for such relief have been complied with. Whether or not the grand jury has acted, either by returning an indictment or ignoring the charge, is a matter peculiarly within the knowledge of the trial court. In the exercise of the discretion which

the court must have, it would not, unless it absolutely misconstrued the statute, direct that the accused be released or his bail be discharged, if it appeared at the time of his application that an indictment had been found against him within the period of limitation fixed by law.

It is respectfully submitted that the judgment of the court below should be reversed.

J. C. McREYNOLDS,
*Assistant Attorney-General.*

WILLIAM R. HARR,
*Special Assistant to the Attorney-General.*

FEBRUARY, 1905.

O